



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 14, 2022

The Honorable Pam Guenther
Jackson County Criminal District Attorney
115 West Main, Room 205
Edna, Texas 77957

Opinion No. KP-0404

Re: Whether article V, section 1-a, of the Texas Constitution prohibits a candidate from running for state judicial office if the candidate is seventy-four years of age on the date of the election but turns seventy-five before the term begins (RQ-0430-KP)

Dear Ms. Guenther:

You ask whether a district judge who runs for reelection at the age of seventy-four but who turns seventy-five between election day and the start of the new term may serve the four-year term to which he seeks election.¹ Article V, section 1-a(1) of the Texas Constitution provides:

Subject to the further provisions of this Section, the Legislature shall provide for the retirement and compensation of Justices and Judges of the Appellate Courts and District and Criminal District Courts on account of length of service, age and disability, and for their reassignment to active duty where and when needed. The office of every such Justice and Judge shall become vacant on the expiration of the term during which the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the Legislature may prescribe, except that if a Justice or Judge elected to serve or fill the remainder of a six-year term reaches the age of seventy-five (75) years during the first four years of the term, the office of that Justice or Judge shall become vacant on December 31 of the fourth year of the term to which the Justice or Judge was elected.

TEX. CONST. art. V, § 1-a(1). When the Legislature proposed the age limit provision in 1965, it described the provision as “requiring automatic retirement” of judges at age 75. Tex. H.J.R. Res.

¹See Letter from Honorable Pam Guenther, Jackson Cnty. Crim. Dist. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 7, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0430KP.pdf>.

57, 59th Leg., R.S., 1965 Tex. Gen. Laws 2227 (preamble). Courts recognize that mandatory judicial retirement ensures that judges who reach an age where they may no longer be effective do not remain in office. See *Hatten v. Rains*, 854 F.2d 687, 692–93 (5th Cir. 1988); *Werlein v. Calvert*, 460 S.W.2d 398, 401–02 (Tex. 1970) (“The reason for the amendment and its purpose are matters of common knowledge. Judges did not always retire when they should and some were reelected after the infirmities resulting from age made it impossible for them to render effective service.”); see also Tex. Att’y Gen. Op. No. M-0627 (1970) at 7 (“[T]he intent appears clear that judges over seventy-five are disqualified to serve.”).

Texas courts and this office have consistently construed section 1-a(1) as a mandatory retirement provision. See, e.g., *Walker v. Emps. Ret. Sys. of Tex.*, 753 S.W.2d 796, 798 (Tex. App.—Austin 1988, writ denied) (asserting that section 1-a(1) “establishes mandatory retirement standards for judges”); *Wal-Mart Stores, Inc. v. Ard*, 991 S.W.2d 518, 524 n.5 (Tex. App.—Beaumont 1999, pet. denied) (citing section 1-a(1) as the basis for “the mandatory retirement age for appellate judges”). Section 1-a(1) provides for the “retirement” of judges, stating a judge’s office “shall become vacant” at the end of the term during which he or she turns seventy-five. TEX. CONST. art. V, § 1-a(1). Pursuant to this language, a judge must leave office at the end of the term. The Texas Supreme Court explained shortly after the amendment adopting an age requirement that it “was adopted to insure that, with certain exceptions to prevent hardship, all judges of the courts designated would retire at or before reaching the age of 75 years.” *Werlein*, 460 S.W.2d at 402.

In *Hatten v. Rains*, the Fifth Circuit Court of Appeals addressed a factual scenario akin to the one you describe. 854 F.2d at 690. A long-serving district court judge turned seventy-five on August 26, 1988. *Id.* His term of office expired December 31, 1988. *Id.* The court concluded that because the judge turned seventy-five “before the beginning of his next term, he [was] ineligible to be placed on the ballot.” *Id.* The scenario you describe involves the same facts—a judge who will turn seventy-five before the beginning of his next term. Long-standing court precedent holds that the judge in this situation may not run for election for another term.

You suggest that *Hatten v. Rains* may be distinguishable because it addressed a prior version of article V, section 1-a(1). See Request Letter at 2–3. Prior to 2007, the provision provided that judicial offices became vacant on the date the incumbent reached age seventy-five. Tex. H.J.R. Res. 57, 59th Leg., R.S., 1965 Tex. Gen. Laws 2227. The provision was amended in 2007 to allow those judges who reached age seventy-five to complete their terms before the imposition of mandatory retirement. Tex. H.J.R. Res. 36, 80th Leg., R.S., 2007 Tex. Gen. Laws 6136. While the timing of the vacancy in *Hatten* may be distinguishable from the scenario you describe, the intervening constitutional amendment does not impact the answer to your question. See *Hatten*, 854 F.2d at 690. The dispositive issue is whether the judge turned seventy-five “before the beginning of his next term.” *Id.* In both instances, the constitutional provision makes the judge who will be seventy-five before a term begins ineligible for reelection.

As you observe, opportunities exist for judges to continue to serve in the judiciary upon reaching age seventy-five and afterward. See Request Letter at 3. The Government Code establishes a procedure by which retired judges may be assigned to “sit on any court of the state of the same or lesser dignity as that on which the person sat before retirement.” TEX. GOV’T CODE

§ 75.002(a). Furthermore, the chief justice of the Texas Supreme Court may assign a retired justice or judge of the supreme court, of the court of criminal appeals, or of a court of appeals to a court of appeals for active service. *Id.* § 75.003(b). Thus, while they may not run for elected judicial office in Texas, former judges who are age seventy-five and over may continue to serve and be compensated as part of the judiciary in some circumstances. *See Werlein*, 460 S.W.2d at 402 (explaining that “the State should not be deprived, absolutely and without exception, of the knowledge and experience of retired judges who have reached the age of 75 years”); Tex. Att’y Gen. Op. No. H-155 (1973) at 2; *see also Lanford v. Fourteenth Ct. App.*, 847 S.W.2d 581, 587–88 (Tex. Crim. App. 1993) (considering whether a former judge could be assigned as a visiting judge).

S U M M A R Y

Under section 1-a(1) of article V of the Texas Constitution, a judge serving a four-year term who will reach the age of seventy-five before the end of the current term must retire at the end of the term of office. Longstanding judicial precedent holds that the judge may neither run for nor serve subsequent terms as an elected judge in Texas.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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